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No. 89-1456

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

PLUMBERS' PENSION FUND, LOCAL 130, U.A., PLUMBERS' WELFARE FUND, LOCAL 130, U.A., AND THE TRUST FUND FOR APPRENTICE AND JOURNEYMAN EDUCATION AND TRAINING, LOCAL 130, U.A.,

Petitioners,

v.

ROBERT NIEDRICH AND DENISE NIEDRICH,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Seventh Circuit

PETITIONERS' REPLY MEMORANDUM

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April 20, 1990

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether a controlling officer or shareholder may be held personally liable under ERISA for a corporation's delinquent contributions to a multiemployer benefit plan where neither the corporate veil can be pierced nor an alter ego established.

LIST OF PARTIES

All parties to the proceeding in the court of appeals are listed in the caption of this Petition.

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Petitioners,

v.

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On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITIONERS' REPLY MEMORANDUM

REASONS FOR GRANTING THE WRIT

The Decision Below Raises An Important Question Regarding The Funding Of Multiemployer Benefit Plans Under ERISA.

A controlling officer or shareholder may be found personally liable as an employer under ERISA for a corporation's delinquent contributions to a multiemployer plan where

neither the corporate veil can be pierced nor an alter ego established.

Respondents' implication that petitioners have waived an argument regarding the purpose of the word "obligated" in § 515 is incorrect (Resp. 7). Petitioners' argument was part of their consistently stated position that § 515 imposes personal liability. The seventh circuit's failure to address the argument does not mean that petitioners waived it.

Furthermore, *Massachusetts Laborers Health & Welfare Fund* v. *Starrett Paving Corp.*. 845 F.2d 23 (1st Cir. 1988), did not address the statutory construction argument raised in this case (Resp. 7). In *Starrett,* the court addressed plaintiffs' argument that the word "obligated" merely describes an employer, but does not limit the applicable class of employers. *Id.* at 26. By contrast, petitioners here argue that the word "obligated" was only designed to limit the applicable class of benefit plans to multiemployer plans.

Respondents try to soften the impact of *Leddy* v. *Standard Drywall, Inc.*, 875 F.2d 383 (2d Cir. 1989), by referring to the court's mention of "alter ego" corporations and the traditional exceptions to the rule of limited corporate liability (Resp. 6). In *Leddy*, there was insufficient evidence to pierce the corporate veil under traditional principles. *Id.* at 387. However, the court held that under ERISA, personal liability for delinquent corporate contributions may be imposed on a controlling shareholder or officer guilty of fraud, a result required by ERISA's purpose of promoting the interests of employees and beneficiaries in plans and of protecting benefits. *Id.* at 388. That same purpose requires the imposition of personal liability even when a delinquency is not caused by fraud. Thus, the *Leddy* rationale reveals a serious flaw in the other circuit decisions.

Respondents misread *Laborers' Health and Welfare Trust Fund for Northern California* v. *Advanced Lightweight Concrete Co.*, 484 U.S. 539 (1988) (Resp. 7). First, *Advanced Lightweight Concrete* is not a withdrawal liability case. *Id.* at 545 n. 10. Second, the case did not address a position similar to petitioners' position here. Unquestionably, this Court ruled that under § 515, the obligation to contribute must arise out of a contract. *Id.* at 549-50 n. 16. However, the Court was not faced with the question of whether a controlling corporate officer or shareholder may be liable for a corporation's delinquent contractual contributions. Thus, although *Advanced Lightweight Concrete* is important, it does not answer the question here.

Actually, this case presents a significant variation on the *Advanced Lightweight Concrete* theme. There, the funds sought contributions under § 515 from a traditional employer, a corporation, but for a period following the expiration of a collective bargaining agreement which had given rise to the duty to contribute. *Id.* at 541, 542. Here, petitioners seek delinquent contributions under § 515 for periods during the pendency of collective bargaining agreements, but from non-traditional employers—controlling officers. Consequently, the resolution of this case will further flesh out the meaning of § 515.

Respondents incorrectly argue that § 515 does not have a counterpart in the Fair Labor Standards Act (FLSA) (Resp. 12). Section 515 codifies the obligation to contribute to plans. Sen. Comm. on Labor and Human Resources, 96th Cong., 2d Sess., S. 1076, The Multiemployer Pension Plan Amendments Act of 1980: Summary and Analysis of Consideration 44 (Comm. Print 1980). Likewise, FLSA codifies the duty to pay a minimum wage and overtime compensation. 29 U.S.C. §§ 206(a), 207(a)(1). Notably, under FLSA, an "employer" is only obligated to pay "*his*

employees" the required amounts—statutory language which at first blush might protect a controlling officer or shareholder from liability as an "employer." *Id.* (emphasis supplied). However, through the FLSA definition of "employer," this Court and the circuits have imposed liability on non-traditional employers. 29 U.S.C. § 203(d); *Falk* v. *Brennan*, 414 U.S. 190, 195 (1973); *Levit* v. *Ingersoll Rand Financial Corp.*, 874 F.2d 1186, 1193 (7th Cir. 1989). Similarly, since ERISA contains a substantially identical definition of "employer", the word "obligated" in § 515 of ERISA does not reduce the applicable class of employers. 29 U.S.C. § 1002(5).

As respondents must concede, Congress did not expressly state whether the FLSA interpretation, with its modification of the rule of limited corporate liability, applied to ERISA (Resp. 11). Congress' silence makes this case attractive—and important—for review. By rejecting personal liability in the absence of an express statement from Congress, the circuits have jeopardized the rights of millions of workers and their families to benefits which they have earned. Given this drastic consequence, this Court should determine the Congressional intent.

The unanimity of circuit results should not deter plenary review because in strictly construing ERISA, the circuits have subverted its purpose. Indeed, the unanimity of the circuits only serves to tie the hands of affected districts and endanger plans and benefits nationwide. Supreme Court review is essential.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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